

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

Government Motion for
Appropriate Relief

Mental Health Records

8 August 2013

RELIEF SOUGHT

With this motion, the United States makes four requests. First, the United States requests that the Court compel the disclosure of any and all materials on which (b) (7)(C) will base his testimony. Second, the United States requests the Court compel the disclosure of the Rules for Courts-Martial (RCM) 706 Board Report without any statements made by the accused. Third, the United States requests that the Court confine any testimony of (b) (7)(C) to the expert's conclusions and opinions. And finally, the United States requests the production of any statements by the expert witness under RCM 914.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of proof on any factual issue, the resolution of which is necessary to decide a motion, shall be by preponderance of the evidence. RCM 905(c)(1). The burden of persuasion on any factual issue, the resolution of which is necessary to decide a motion, shall be on the moving party. RCM 905(c)(2). The prosecution has the burden of persuasion as the moving party.

FACTS

PFC Bradley Manning has been found guilty of eighteen specifications as charged and four specifications by exceptions and substitutions and/or to the lesser included offenses. *See* AE 624. The proceedings are now in the presentencing phase.

On 6 August 2013, the Defense submitted its list of expected witnesses for the presentencing phase of this court-martial. *See* AE 638. This filing confirmed (b) (7)(C) would testify as a witness for the defense. In a previous filing, the defense had proffered:

(b) (7)(C) will testify that PFC Manning was gay and was suffering from Gender Identity Disorder (GID) before and during the deployment. (b) (7)
(b) (7)(C) will testify that PFC Manning had no ability to turn to mental health for assistance given the fact that he would be recommended for separation if he did. Consequently, PFC Manning's struggles compounded and started to erode his ability to function properly while at work. (b) (7)(C) will testify that PFC Manning's high IQ and social ineptness compounded these struggles. (b) (7)
(b) (7)(C) will testify that PFC Manning had regressed stages of development and was still in the post-adolescent idealistic stage where he believed he could change

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the world and make the world a better place. (b) (7)(C) will testify that PFC Manning's idealism along with a narcissistic personality trait resulted in PFC Manning believing that he was capable of making the determination of what information should and should not be released for the public good. (b) (7)(C) will testify that PFC Manning struggles for acceptance and suffers from a mild form of Asperger's. (b) (7)(C) will testify that PFC Manning's condition makes it difficult for him to pick up on social cues and causes him to sometimes say or do things that others might take offense to, but that he does not intend or realize is offensive. (b) (7)(C) will testify that PFC Manning's condition would make it difficult for him to make close friends. (b) (7)(C) will testify that due to his struggle for acceptance, PFC Manning would seek approval from others that what he is doing is the right thing. (b) (7)(C) will testify that this would also cause PFC Manning to be very sensitive to criticism or someone telling him that he has done something wrong. (b) (7)(C) will testify that this condition is undoubtedly why PFC Manning reached out to Mr. Adrian Lamo. Ultimately, (b) (7)(C) will testify that PFC Manning's actions can be explained as an effort to do what he believed was the right thing for the right reason but under flawed reasoning.

AE 344.

WITNESSES/EVIDENCE

The prosecution requests the Court consider the referenced Appellate Exhibits (AE) and legal authority.

LEGAL AUTHORITY AND ARGUMENT

I. THE UNITED STATES IS ENTITLED TO MATERIALS UNDERLYING THE EXPERT'S OPINION

Under Military Rule of Evidence (MRE) 705, the military judge may require the facts or data underlying a testifying expert's opinion and inference to be disclosed prior to that expert's testimony. *See* MRE 705. Moreover, this material "may in any event be required . . . on cross-examination." *Id.* Further, in the case of mental health records, RCM 701(b)(4) compels the defense, on Government request, to disclose mental health exams and reports, provided the Government has complied with an RCM 701(a)(2)(B) request by the defense. This Rule incorporates RCM 706 and MREs 302 and 513 by reference. *See* RCM 701(b)(4) (stating "except as provided in R.C.M. 706, Mil. R. Evid. 302, and Mil.R. Evid. 513").

In so far as non-RCM 706 Board materials are concerned, MRE 513 is instructive. MRE 513(d)(7) explains that when mental health evidence is offered by the accused during presentencing that is not covered by RCM 706 and MRE 302, the military judge may, upon motion and in the interests of justice, order the disclosure of statements the accused made to mental health professionals. *See* MRE 513(d)(7).

In this case, the United States made a reciprocal discovery request for accused mental health information on 29 March 2012. Therefore, pursuant to RCM 701(b)(4) and MRE 513, the United States should receive any and all materials upon which (b) (7)(C) will base his testimony. From discussion with (b) (7)(C) on 7 August 2013, the United States understands this list to include, at least, the following materials:

- a. Pre-military mental health records
- b. Pre-deployment mental health records
- c. Deployment mental health records
- d. Confinement mental health records
- e. Records from psych-testing during time at Joint Regional Confinement Facility (JRCF)
- f. School records
- g. Records and notes from any mitigation expert's interviews with family and friends
- h. Notes from (b) (7)(C) own interviews with the accused
- i. Records from and regarding the Article 15-6 investigation

The United States respectfully requests that the Court order the disclosure of these materials in order to confirm that (b) (7)(C) does not have any other records in these or other relevant categories. **On 8 August 2013, the defense agreed to provide the above-listed materials in their possession.**

II. THE UNITED STATES IS ENTITLED TO THE LONG-FORM OF THE RCM 706 BOARD REPORT EXCLUDING STATEMENTS BY THE ACCUSED

While MRE 513 addresses mental health privilege outside the RCM 706 Board context, according to RCM 701(b)(4), RCM 706(b)(5) and MRE 302 control within it. RCM 706(b)(5) states that "no person, other than the defense counsel, accused, or, after referral of charges, the military judge may disclose to the trial counsel any statement made by the accused to the board or any evidence derived from such statement." This Rule therefore contemplates the military judge's release of this material. MRE 302 goes on to explain how and when this may occur. MRE 302 was intended to "protect an accused from use of anything he might say during a mental examination' ordered under RCM 706", provided the accused has not "first [introduced] into evidence such statements or derivative evidence." *United States v. Clark*, 62 M.J. 195, 198 (C.A.A.F. 2005); *see also* MRE 302(b). However, "once the defense offers expert testimony concerning an accused's mental condition, MRE 302(c) allows the military judge to provide the Government with the sanity board report after redacting the accused's statements." *See United States v. Clark*, 62 M.J. at 200. In *Clark*, the mental health evidence elicited by the defense during sentencing was not derived from the report and did not include specific statements by the

accused, and so the military trial judge had erred in allowing the full sanity board report to be disclosed to the prosecution “in its entirety and allowing the Government to admit Appellant’s statements into evidence.” *See id. at 199-200.*

The United States concedes that, according to the Analysis of MRE 302, “[i]f the accused fails to present an insanity defense or does so only through lay testimony, for example, the trial counsel will not receive access to the report.” Analysis MRE 302(c). Moreover, CAAF acknowledges this in *Clark* - saying “[i]f the defense does not allege insanity at court-martial, or does so only through lay testimony, the sanity board report will not be provided to the prosecution.” *See United States v. Clark*, 62 M.J. at 200. However, in *Clark*, CAAF went immediately on to say “But ‘[i]f the defense offers expert testimony concerning the mental condition of the accused,’ the military judge shall compel the defense to release to the prosecution ‘the full contents, other than any statements made by the accused,’ of the sanity board report.” *Id.* In this sense, CAAF drew a line to reconcile competing interests; the prosecution may receive the report if the defense makes an issue of the accused’s mental health, it simply may not receive statements the accused made (provided those statements and derivative evidence will not be used by the expert mental health professional testifying). *See id.* Although here the defense has not raised an insanity defense, the proffered testimony of (b) (7)(C) indicates the defense will make an issue of the accused’s mental health. According to *Clark*, the United States should therefore receive the RCM 706 Board Report with accused’s statements redacted.

According to the Government’s conversations with the expert and with the defense, (b) (7)(C) does not have the RCM 706 Board Report and thus will not base his opinions and (7) conclusions as to the accused’s mental health on that material. However, should (b) (7)(C) review this material, and during the course of his testimony relay the accused’s statements from it, the United States would then request that the full contents of that report (including the accused’s statements) be made available to the United States. MRE 302(b)(2) and (c) suggest that in the event the defense offers these statements, the statements can then be released to the prosecution and testified to by a prosecution expert. *See* MRE 302(b)(2) and (c); *see also United States v. Clark*, 62 M.J. at 200 (explaining that the release of the unredacted RCM 706 Board report to the prosecution was error because the expert at issue had not offered testimony that was derivative of the Report or relayed statements from it). Additionally, MRE 302 notes that a prosecution’s expert witness may only testify as to conclusions and reasoning and not to accused’s statements unless the accused first introduces this evidence as well. *See* RCM 302(b).

III. THE TESTIMONY OF THE EXPERT MENTAL HEALTH PROFESSIONAL SHOULD BE CONFINED TO OPINIONS AND CONCLUSIONS

MRE 703 states that, when an expert offers testimony, “facts or data that are otherwise inadmissible shall not be disclosed . . . by the proponent of the opinion or inference unless the military judge determines that their probative value . . . to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”

In this case, most statements by the accused, which the expert will discuss, were made out of court. And, none of these has been subject to cross-examination. Though the type

potentially relied upon by mental health professionals, such statements would be hearsay and otherwise inadmissible if offered in Court for the truth of what they assert. *See* MRE 801 and MRE 802. Additionally, even if these statements are relevant and offered for a non-hearsay purpose, these statements would be too prejudicial and should be excluded pursuant to MRE 403. *See* MRE 403.

At least two cases discuss the prejudicial nature of such out-of-court statements in the context of mental health professional testimony. They indicate that the protections afforded the accused's statements by MRE 302 and RCM 706 should not be vehicles to import otherwise inadmissible hearsay. In *United States v. Stark*, 24 M.J. 381, 384 (C.M.A. 1987), defense counsel moved into evidence videotaped interviews of the appellant with the mental health expert. The Court of Military Appeals ultimately upheld the military judge's exclusion of this evidence because it "would have clearly given appellant an opportunity to smuggle eight hours of testimony . . . without subjecting himself to the crucible of cross-examination." And, in *United States v. Schap*, 49 M.J. 317, 324 (C.A.A.F. 1998), "the defense wanted the [mental health] expert to repeat or publish . . . much of what the appellant told them regarding his state of mind and emotions at the time of the offense" in order to attack the *mens rea* elements of the charged offense. In its review of this behavior, CAAF suggests that using MRE 703 and 705 to permit experts to relate an accused's hearsay would encourage accused individuals to simply tell a doctor their side of a story and "then just call the doctor in to testify", all while the accused remains insulated from confrontation. *Id.* at 325-26. The court went on to reason that even if the statements at issue satisfied a hearsay exception such as the medical-hearsay exception, they should be excluded as unfairly prejudicial under MRE 403. *United States v. Schap*, 49 M.J. at 325. For "Mil.R.Evid. 403 is a judge's tool for preventing a part from unfairly smuggling hearsay, either as 'basis' for an expert's opinion or under the various hearsay exceptions." *Id.* at 326. And, to allow experts to parrot the accused's version of events under this "basis" guise would be to allow the accused to hide behind the Constitutionally-granted Fifth Amendment shield while using privilege protections to circumvent cross-examination.

Finally, the RCM affords the accused the opportunity to make a sworn or unsworn statement during pre-sentencing. *See* RCM 1001 (c)(2) ("The accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution."). *Stark* acknowledges this as well, stating "there was no limitation on appellant's ability to testify in his own defense." *United States v. Stark*, 24 M.J. at 385. However, sworn oral testimony shall be subject to cross-examination, and any unsworn statement subject to the prosecution's opportunity to rebut any statements of facts therein. *See* RCM 1001(c)(2)(B)-(C). In this case, if an expert relays the accused's statements those statements will be subject to neither cross-examination nor effective rebuttal. As mentioned above, barring the providence statement, all of these materials will include statements that have been made out of court. Also, none of the categories of information on which (b) (7)(C) will base his testimony will include statements made by the accused while subject to cross-examination. Further, the United States can find no authority under which it can have its own forensic psychologist interview the accused to draw his or her own conclusions. As such, if (b) (7)(C) testimony is to include statements by the accused, these statements will become evidence not subject to any effective challenge – neither by cross nor by independent review and rebuttal. Therefore, pursuant to the

above-discussed authority, (b) (7)(C) testimony should be confined to his conclusions and reasoning but not be permitted to relay any statements made to him by the accused.

IV. THE UNITED STATES IS ENTITLED TO ANY STATEMENT MADE BY (b) (b) (7)(C) RELATING TO HIS TESTIMONY

RCM 914 states "After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified." The United States accordingly requests that any such statements (including any qualifying emails) be made available to the prosecution.

CONCLUSION

Based on the foregoing authority and argument, with this motion the United States respectfully requests the Court take four actions. First, the United States requests that the Court compel the disclosure of any and all materials on which (b) (7)(C) will base his testimony. Second, the United States requests the Court compel the disclosure of the Rules for Courts-Martial (RCM) 706 Board Report without any statements made by the accused. Third, the United States requests that the Court confine any testimony of (b) (7)(C) to the expert's conclusions and opinions. And finally, the United States requests the production of any statements by the expert witness under RCM 914.



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I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel, via electronic mail on 8 August 2013.



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